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Seashore and the People

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The Seashore and the People

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This article attempts an exposition of adjudicated rights in and to that portion of the land between high and low tidewater, technically known as the foreshore and popularly as the seashore. Broadly speaking, the discussion is limited to the law of this (New York) state and the *locus in quo* is practically confined to the Long Island littoral. Probably nowhere have the questions involved assumed such importance as in the vicinity of the Greater City of New York—questions perplexing alike to administrators charged with the protection of public interests, to lawyers in advising their clients, and, particularly, to judges in their efforts to arrive at decisions at once just and harmonious. The task of the latter has been made peculiarly difficult by an increasing social impact; tremendous populations, already crowding, continue to augment, while nature has limited for all time the extent of the seashore. It follows that in modern times emphasis has fallen upon that aspect of it involving the public use and enjoyment of the beach. While the investigation is primarily that of the cases, research takes us back to Saxon England and the ancient law of the manor, through the history of the struggle between Charles the First and his subjects, across the Atlantic and the settlement of the New World, to present day industrialism with its teeming cities and the consequent pressure of a collective philosophy on the judicial process.

About three hundred years ago Long Island began to be colonized. Both the Dutch and English patents embraced large tracts of land. Some of these grants ran to individuals, others to groups aspiring to found a community or township. Many of these grants were bounded by Long Island Sound on the north or the Atlantic Ocean on the south or by both.[1] These conveyances were most comprehensive, including not merely the land, but rivers and inlets, extensive harbors and bays, estuaries both of sea and sound where the rise and fall of the tide has caused countless beaches. An appurtenance clause, or one similar, commonly found in the grants is as follows:[2]

"TOGETHER with all the lands, soyles, woods, meadows, pastures, marshes, lakes, waters, fishing, hawking, hunting and

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[1]The grants to the towns of Hempstead, Huntington, and Brookhaven all run from sea to sound. Thompson, History of Long Island.

[2]Grant of Governor Andross to Richard Smith, March 25, 1677, known as the Smithtown Patent. Thompson, *supra*, at p. 454.

fowling and all other profits, commodities and emoluments to the said parcells of land and premises belonging; with their and every of their appurtenances and every part and parcell thereof."

These grants, extravagant if viewed in the light of the present, were necessary inducements to colonization especially where the venturers had to cross thousands of miles of ocean in sailing ships while the land, the spoils of discovery, was in abundant supply. Since those days of much land and a few people living close to the soil, largely on the bounties of nature, a profound change has taken place. The invention of machinery, the era of factories, and the quantity production of goods has so augmented the growth of urban populations that, to-day, at the western end of Long Island millions of people are densely concentrated and rapidly increasing. To this mass of humanity, steam, electric, and gas engines have brought into close proximity the outlying sections of Long Island—places that were once distant a day's or a week's travel are now but a few hours away.[3] With large cities and modern transit facilities have come other products of the industrial machine—a shorter work day, increased leisure, and a diffused prosperity, so that recreation is the standing order in countless urban families for summer week-ends. During this period hundreds of thousands of sojourners leave the city by train and motor car, and picnicking and bathing along the seashore have assumed vastly popular aspects. The beaches of the sinuous Long Island coast, once lonely and remote, offer easy and inviting respite to city dwellers escaping from the monotony of a highly mechanized existence. It is but natural to use and enjoy what lies before them without hesitating over abstruse questions of ownership. The result is an invasion, constantly growing, of privacy and what have heretofore been assumed to be the exclusive privileges of private ownership. The questions are both pressing and complex, involving a history of three hundred years of litigation. Who owns these salt water beaches; the state, the towns, or private persons? What is the character of the ownership, and what are the corresponding rights and privileges? Are they exclusive? Must they be shared, and if so, by whom and under what circumstances? And, in the legal determination of such questions, by what tests or principles shall we be

[3]The first stage route through Long Island was established in 1772, taking two days to make that part of the trip between Smithtown and Brooklyn, now made in less than two hours. Fifty years ago it was a day's buggy ride (to and from) the then city of Brooklyn to the seashore at Coney Island, consisting of unfrequented sand dunes and a few fishermen's shacks; the trip to-day is made by electric train in thirty minutes, and during the summer millions of people visit the beach.

guided? What was the ancient law, what is its history, what is its present status and what is a proper restatement?

The Ancient History of the Foreshore. An Appurtenance of the Adjacent Upland

Modern legal scholarship[4] has demonstrated that in ancient England, both in Saxon times and after the Norman conquest, the adjacent upland owner, the Lord of the Manor, both by express charter and by clear implication owned the land between high and low water mark. This rule of property is revealed by Saxon and Norman records, and it existed unquestioned until the reign of Elizabeth, a period of at least seven hundred years;[5] it is analagous to the general rule, still existing, that where property was bounded by a non-tidal stream title carries to the center thereof.[6] Co-existant with this private ownership of the foreshore there was an equally well recognized common law right in favor of the public to pass in boats over the navigable waters, including those over the foreshore when the tide was in.[7] These two rights were not in conflict. When the tide was out and the beach left dry, the upland owner had the use thereof; when the tide was in and the beach was covered with water, the public could pass thereover in boats. The first incident of title to private property, the latter was a public easement of navigation, analagous to passage over the highway.

In 1569, during the reign of Elizabeth, one Thomas Digges wrote a treatise entitled "Proofs of the Queen's Interest in Lands left by the Sea and the Salt Shores thereof", which asserted that the title to the foreshore instead of being in the adjacent manorial owners was *prima facie* in the crown.[8] This theory rested upon the assumption that the soil of England's coasts between high and low water mark had never been granted. It ignored entirely the records of Saxon charters, confirmed by Norman crown grants, including the beach as an appurtenance of the adjacent upland and carrying title to low water mark.[9] Digges obtained grants from the crown of shore lands and then instituted proceedings to recover possession from their owners.

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[4]Moore, History and Law of the Foreshore and Seashore.
[5]*Idem.*
[6]Fulton Light, Heat & Power Co. v. State of New York, 200 N. Y. 400, 414–415 (1911); as to *large* non-tidal bodies of water title carries to *low* water mark, Stewart v. Turney, 237 N. Y. 117, 122–123 (1923). Hale, De Jure Maris, ch. I.,
[7]Williams v. Wilcox, 8 Ad. & El. (Eng.) 314, 333 (1838); Gould, The Law of Waters, sec. 53; Hale, De Jure Maris.
[8]Moore, *supra*, n. 4.
[9]*Idem*, p. 184.

His efforts were uniformly unsuccessful[10], and he died in 1595 a defeated claimant. His theory was expressly repudiated in two early English cases affirming the rule that the foreshore belonged to the upland owner.[11]

THE DIVINE RIGHT OF KINGS. THE ASSAULT ON PRIVATE OWNERSHIP OF THE FORESHORE

The litigious activity commenced by Digges was continued by James I and received fresh impetus when Charles Stuart became King of England.[11a] With him the theory of the divine right of kings attained a highly practical application, and the rejected contention of the deceased Digges advocating a royal ownership of the shore lands engaged the personal interest of Charles. Financially hard pressed, and resorting to every device,[12] one of his methods of raising money was through the sale of commissions involving both the foreshore and fishery rights in the navigable waters. Up to this time the courts had consistently refused to recognize the title claim of the crown. In 1628 Charles and his ministers contrived to get the question presented before a selected bench in the case of *Attorney-General v. Philpot.*[13] The case involved the removal of a pier erected upon the shore of the Thames River by the adjacent upland owner, the king contending that he owned the title to the foreshore and that the structure was a trespass or purpresture. On the first hearing Chief Baron Walter said:—"*Prima facie* and of common right those who have land adjoining to the said river or any river which ebbs and flows, shall have all the land to the low water mark, and it shall be intended to belong to those who have the land upon each side." This reaffirmed the time-honored rule that the upland owner owned the title to the foreshore and did not fit in with the king's purposes; there was a re-hearing, meanwhile Baron Walter being removed from the bench. Baron Denham in giving judgment for the king, stated that he "has interest in a navigable river as high as the sea flows and reflows, and the reason is, because such river partakes of the nature of the sea, and is called an arm of the sea as high as it flows, and the King has the sole interest in the soil of such rivers." The judges participating in this decision were favored appointees of the king,[14]

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[10] *Idem.*, ch. xi.

[11] Sir John Constable's Case, 17 Eliz. (1575), Anderson 86; Sir Henry Constable's Case, 43 Eliz. (1601), 5 Co. Rep. 106.

[11a] Moore, *supra*, n. 4, p. 258

[12] Green, History of the English People, vol. 3.

[13] Extensively reported only in Moore, *supra*, n. 4., p. 262 *et seq.*

[14] Some of the same judges sat in the famous Ship-money case against Hampden and were later impeached by the House of Lords. Moore, *supra*, p. 279.

and the pleadings themselves set forth that the action was brought to augment the revenues of the crown.[15] The doubtful decision in the *Philpot* case, however, was not followed up, the king being defeated in further attempts,[16] and shortly thereafter the Grand Remonstrance of 1641 was brought against him. So notorious had been Charles' efforts to gain control of the foreshore that Article 26 of the Remonstrance charges him "with the taking away of men's rights under color of the King's title to land between high and low water mark." The Rebellion followed, Charles lost his head, and thus was brought to a definite end this royal effort to snatch the seashore from its owners.

Lord Hale's Writings. The Perpetuation of the Theory of the King's Title to the Foreshore

It is an entirely reasonable supposition that the theory that the king owned the foreshore in opposition to the ancient rule that it accompanied the title to the adjacent upland would not have survived either in English or American jurisprudence had it not been for the authorship of Lord Matthew Hale.[17] Up to the time of the American Revolution, excepting the unreported *Philpot* case, there are no English cases definitely holding that the foreshore was owned not by the upland proprietor but by the crown.[18] While at the bar Lord Hale had acted as counsel for the crown in shore front cases, subsequently becoming Lord Chief Justice of England. He died in 1676, and his treatise "De Jure Maris" was not published until 1787, twelve years after the battle of Lexington. With reference to the title to the foreshore the treatise states that it

> "* * * doth *prima facie* and of common right, belong to the King, both in the shore of the sea and the shore of the arms of the sea. * * * It is admitted that 'de jure communi' between the high-water and low-water mark doth *prima facie* belong to the King. Although it is true, that such shore may be and commonly is parcel of the manor adjacent, and so may be belonging to a subject, as shall be shown, yet *prima facie* it is the king's * * *."[19]

[15] *Supra*, n. 13.

[16] Moore, *supra*, p. 281.

[17] In Attorney-General v. London, 8 Beav. (Eng.) 270 (1845), Sergeant Merewether states in his argument that there is no basis for the claim of crown ownership of the foreshore against the upland owner, in Saxon charters or laws, Doomsday Book, Laws of William I or Henry I, Glanville Magna Charta, Bracton, Britton, the Year Books, or any other authority down to the time of James I. The argument is published in Appendia to Hall on Seashore (2d ed.), and is accepted by Farnham, Waters, vol. 1, sec. 39; Gould, Waters (3d ed.), sec. 18, and by Moore, *supra*. The latter shows that practically all the land on the seacoast of England had been granted by the crown in Saxon and Norman times, and that the shore was regarded as part of the grants.

[18] Riggs, Alienability of the Foreshore, 12 Col. L. Rev. 402.

[19] Hale, De Jure Maris, ch. iv, sub. ii; Hargraves Law Tracts.

This rule of crown ownership of the seashore is innocuous enough, if taken to mean that title was in the king in those cases where no grant had been made of the *adjacent upland*, but that where such grant had been made the shore, as appurtenant, was included in the title.[20] Such, however, is not the interpretation subsequently adopted by the courts.

With reference to the public rights over navigable waters Lord Hale writes:—

> "* * * There may be such an interest lodged in a subject, not only in navigable rivers, but even in the ports of the sea itself, contiguous to the shore, though below the low-water mark, whereby a subject may not only have a liberty but also a right or propriety of soil. But yet this, that I have said, must be taken with this allay, which I have in part premised.
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> "1st. That this interest or right in a subject must be so used as it may not occasion a common annoyance to passage of ships or boats;—for the jus privatum, that is acquired to the subject either by patent or prescription, must not prejudice the jus publicum, wherewith public rivers or arms of the sea are affected for public use. * * *[21]
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> "2nd. That the people have a public interest, a jus publicum, of passage and repassage, with their goods by water, and must not be obstructed by nuisances, or impeached by actions, as shall be shown when we come to consider of ports. For the jus privatum of the owner or proprietor is charged with and subject to the jus publicum which belongs to the king's subjects; as the soil of an highway is, which though in point of property it may be a private man's freehold, yet is charged with a publick interest of the people, which may not be so prejudiced or damnified."[22]

It will be noted from a close reading of the foregoing that this great jurist in defining the *jus publicum* limits it to navigation over the waters, and in stating that the *jus privatum* or title to the soil is subject to the *jus publicum* or right of navigation, he specifically refers to "a right or propriety of soil *though below the low-water mark*" and not the tideway itself.[23] The only other public right in the navigable waters mentioned by Hale is that of a "publick common of piscary", which, however, he states may be the subject of an exclusive private grant.[24]

[20]Hale might have so intended, as in the original *manuscript* of his first treatise (Hargrave No. 98) he conceded the ownership of the foreshore by the adjacent manor upon the authority of Sir Henry Constable's Case (*supra*, n. 11) and states that the shore is "most ordinaryly parcell of the adjoyning land" and only *prima facia* in the king. In chapter V, however, of the treatise as published, he refers to the necessity of an *express* grant of the foreshore.

[21]Hale, *supra*, ch. v.

[22]*Idem*, ch. vi.

[23]Riggs, *supra*, n. 18, at p. 403.

[24]Lord Fitzwalter's Case, 1 Mod. (Eng.) 106 (1673); Hale, *supra*, ch. iv.

With the passing of the Stuart kings and the divine right theory, litigation over the foreshore between individual owners and the crown gradually disappeared, and it is not until *after* the American Revolution that we find English cases[25] definitely declaring in favor of the *prima facie* theory of crown ownership and developing in apposition the theories of the *jus privatum* and *jus publicum*.[26] At the time, however, of the American Revolution,[27] the common law of England (always excepting the unreported *Philpot* case) was that the title of the adjacent upland owner carried to low water mark, as first stated by Baron Walter even in the *Philpot* case.[28] Furthermore, as stated in the case of *Bell v. Gough*:[29]

> "There is no evidence that the jus privatum, the right of private property in the shore to low water mark was ever asserted in the colony as a right of the crown, or that it has until recently been claimed by the state, but there is on the contrary, in my opinion, the strongest evidence that this right has been abandoned to the proprietors of the adjoining land from the first settlement of the Province and exercised by them to the present day so as to become a common right and thus the common law."

It follows that the courts of this state, in approaching the question, could and probably should have adopted[30] this rule of upland ownership instead of following, as they did,[31] the theory of crown ownership, ambiguously stated by Hale, and developed by the English cases subsequent to the Revolution. To have done so, however, would have required much patient research, or the results of the same, which were not at the time available,[32] whereas the theory that the king and therefore the State of New York, as his successor, was the owner of the land between high and low water mark, unless the same had been expressly conveyed, was ready to hand and had gained currency.[33] This rule of title having been

[25]Lord Advocate v. Blantyre, 4 A. C. (Eng.) 770, 773 (1879).

[26]Moore, *supra*, n. 4, p. 432–3. Att'y.-Gen. v. Richards, 2 Anst. (Eng.) 603 (1795); Parmeter v. Att'y.-Gen., 10 Price (Eng.) 412 (1813).

[27]April 19, 1775.

[28]Att'y.-Gen. v. Turner, 2 Mod. (Eng.) 106 (1793), 2 Lilly's Practical Register, tit. Rights; Moore, *supra*, n. 13; Coudert, Riparian Rights: A Perversion of Stare Decisis, 9 Col. L. Rev. 223; Parson's Public and Private Rights in the Foreshore, 22 Col. L. Rev. 711.

[29]23 N. J. L. 624, 661 (1852), quoted in Gould on Waters, p. 75, and referred to in the Brookhaven and Barnes cases, *infra*, n. 34, 46.

[30]Bogardus v. Trinity Church, 15 Wend. 111 (1835); Waters v. Gerard, 189 N. Y. 302 (1907); New York State Constitution of April 20, 1777, sec. 35.

[31]Canal Comm. and Appraisers v. People ex rel. Tibbets, 5 Wend. (N. Y.) 423 (1830).

[32]Moore's History of the Foreshore was not published until 1888.

[33]Hale, *supra;* 2 Blackstone's Commentaries 261; Kent's Commentaries; and English cases decided subsequent to 1775, *supra*, n. 26. Chancellor Walworth in deciding People ex rel. Tibbets in 1830, *supra*, n. 31, at p. 443, said: "In England

adopted it became necessary to determine exactly what portions of the shore lands had been granted by the king in colonial times.

TITLE TO THE BEACHES. THE VALIDITY AND INTERPRETATION OF THE COLONIAL CROWN GRANTS

The primary inquiry involved the validity of the grants of the colonial governors, representing the king, both to individuals and to groups of freeholders establishing a town. It was early decided that these conveyances having been confirmed by the New York colonial assembly and validated by the constitution of the state were binding, and it is under such grants that title to property is derived, and they constitute the bedrock of our system of land titles.[34] The next question involved an interpretation of these grants where the description designated as a boundary the ocean or sound, and it was decided in harmony with the *prima facie* rule, that the beach was not included in the upland title unless it expressly ran to low water mark, or, by some distinctive phrase, included the beach as an appurtenance.[35] Otherwise the title ran to high water mark only,[36] and the foreshore being unconveyed and left in the crown, the state succeeded to the title.[37] The result of such decisions has been to give to the state practically all the beach land below high water mark along the Atlantic ocean and Long Island Sound shore fronts, although the adjacent upland is owned by towns or individuals.

The next question arose as to the title to the bodies of water and their beaches, consisting of the bays, creeks, inlets, and other estuaries of the sea and sound. If such waters were to be regarded as integral parts of the sound or ocean, under the rule that the grant ran only to high water mark, it would follow that the state also owned the beaches of these various interior bays and inlets where the tide rose and fell. The case of *Lowndes v. Huntington*[38] decided this question by declaring that where the words "sound" or "ocean" were

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no principle of the common law as to the rights of property is better established," citing Hale and Kent. "The fountain from which all the rules on the subject now under consideration have been drawn, is the celebrated treatise *de jure maris* by Lord Chief Justice Hale." People v. Canal Appraisers, 33 N. Y. 46, 468 (1865).

[34]People v. Clark, 10 Barb. 20 (1850); Brookhaven v. Strong, 60 N. Y. 56 (1825); Town of Southhampton v. Mecox Bay Oyster Co., 116 N. Y. (1889); Laws of the Colony of N. Y., 1694, vol. i, p. 224; Constitution of N. Y., Art 1, sec. 17.

[35]Rockaway Beach Co. v. City of N. Y., 140 App. Div. 160 (1910), upholding Dongan patent of beach to Capt. John Palmer, the description reading "on the south with the Maine sea to low water mark."

[36]Ex parte Jennings, 6 Cow. (N. Y.) 518 (1826); Mayor v. Hart, 95 N. Y. 443 (1884); Matter of City of N. Y. (West Farms Rd.), 212 N. Y. 325 (1914).

[37]People v. Trinity Church, 22 N. Y. 44 (1860); Wendell v. People, 8 Wend. 183 (1831); Knickerbocker Ice Co. v. Schultz, 116 N. Y. 382., (1889).

[38]153 U. S. 1 (1894).

used as indicating the boundaries of the grant they referred to the main or outlying body of water and that their estuaries, such as bays, harbors, and inlets, were within such boundaries and passed with the grants, and the state had no title therein. This decision harmonizes with similar New York cases involving crown grants to the various Long Island townships.[39]

To summarize with reference to the title documents it is established (a) that the crown grants involving the beaches are valid, (b) that the state owns the beaches along the sound or ocean front unless the colonial grant ran to low water mark or the beach is expressly designated, and (c) that, where the grant is bounded by the sea or sound, title to the connecting harbors and bays with their beaches is in the grantees or their successors and not the state.

The Riparian Rights of the Upland Owner. A Quasi Re-assertion of the Ancient Law of the Manor

If, under the *prima facie* theory, the king privately owned all unconveyed tidal lands and the state succeeded to his title, it followed that the adjacent upland owner had no property rights in the foreshore. Such substantially became the law of England[40] and the rule early adopted in this state.[41] This worked an injustice to the upland owner, who was obviously the person who could best use the beach in front of his property, which may have been the reason for the original doctrine regarding the beach as an appurtenance of the upland. The courts of this state, recognizing the hardship of thus restricting the upland owner, gradually accorded him property rights in the foreshore,[42] even to the erection of structures, such as a pier,[43] even though the latter might interfere with the use of the beach by the holder of the title; and the latter was restrained from erecting structures which would interfere with the rights of the upland owner.[44] Profoundly considered, these adjudications establishing substantial property rights of the upland owner in and to the beach reconstitute

[39]Tiffany v. Town of Oyster Bay, 209 N. Y. 1 (1913); Grace v. Town of North Hempstead, 166 App. Div. 844 (1915), aff'd. 220 N. Y. 628; Starke-Belknap v. N. Y. C. R. R. Co., 197 App. Div. 249 (1921), aff'd. 234 N. Y. 630; Bliss v. Benedict, 202 App. Div. 115 (1922), aff'd. 234 N. Y. 596.

[40]This was the judgment in the Philpot case, followed in Att'y-Gen. v. Richards (1795) and Parmeter v. Gibbs (1813) *supra*, n. 26. However, Buccleuch v. Metrop. Board of Works, L. R. 5 H. L. 418 (1872) finally modified this rule in favor of the upland owner.

[41]Lansing v. Smith, 8 Cow. 146 (1828); Gould v. Hudson Riv. R. R. Co., 6 N. Y. 522 (1852).

[42]Rumsey v. N. Y. & N. E. R. R. Co., 133 N. Y. 79 (1892); Matter of City of N. Y., 168 N. Y. 134 (1901).

[43]Trustees of Brookhaven v. Smith, 188 N. Y. 74 (1907).

[44]Tiffany v. Town of Oyster Bay, 234 N. Y. 15 (1922).

to this extent his ancient status as its true owner, and, in effect, distinctly modify the *prima facie* rule of title. Indeed the dissenting opinion of Hiscock, J., in the *Brookhaven* case, adhering as it does to the rule of the king's personal ownership of the shore, is entirely logical. The court might unanimously have achieved the same result by disregarding the *Philpot* case and the *prima facie* theory, and, by reviving the law treating the beach as appurtenant to the upland,[45] thus have avoided the inconsistencies which the dissenting opinion so clearly indicates. As it is, the court in upholding the claim of the upland owner to a practical use of the adjacent beach denied *pro tanto* the rights of the title owner; it stopped short, however, of a rejection of the theory of the king's title, achieving its ends by subjecting the title to a broad easement. The case of *Barnes v. Midland R. R. Terminal Co.*[46] closely followed, reaffirming the easement of the riparian owner, but holding that it should be so exercised as not to interfere with a public right of passage. If, as has been contended,[47] the court in the *Brookhaven* and *Barnes* decisions aban-

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[45]On ground that such was the common law of England in 1775, and in any event that of the former colony of N. Y. see n. 33, *infra*.

[46]193 N. Y. 378 (1908).

[47]Coudert, *supra*, n. 28, at p. 231. In Bardes v. Herman, 62 Misc. (N. Y. 428, 431–2 (1909), Blackmar, J., takes exactly this view, stating: "The Barnes case decided that the common law of England as to the ownership by the sovereign of the *jus privatum* never obtained in the province which became the State of New York; but that the *jus privatum*, which I understand to be the complete title, subject to the rights of the public, was abandoned to the owners of the upland. *** It is claimed that the rule that the *jus privatum* is owned by the adjacent proprietors is inconsistent with the continued grants of land under water by the State. But these grants were *eo nomine* made for the benefit of commerce and they could be made only to the owners of the adjacent land, thereby recognizing by this right of pre-emption the interest of the owners in the foreshore and land under water. The Norwood patent *** was bounded to the east by the 'waterside.' If I am right as to the rule laid down in the Bares case, the *jus privatum* in the foreshore was vested in Norwood even if the word 'waterside' meant high water mark." However, in Oelsner v. Nassau Light and Power Company, 134 App. Div. (N. Y.) 281, 285 (1909), Miller, J., in a characteristically incisive analysis of the Brookhaven and Barnes cases, with comment on the view just quoted, says in part:

"The decisions in *Town of Brookhaven v. Smith* * * * and *Barnes v. Midland R. R. Terminal Co.* * * * have been construed by an able and careful judge as holding that the complete title, subject to the rights of the public, is in the owner of the uplands. (See *Bardes v. Herman*, 62 Misc. Rep. 428.) I do not think that the Court of Appeals intended to announce any such doctrine. * * * The *Town of Brookhaven* case decided that the common law of England was inapplicable to our changed conditions in so far as it did not allow the riparian owner to make practical use of his right of access by the construction of a wharf or pier. The Barnes case decided that that right must be exercised in a reasonable way so as not to interfere with the right of passage of the public.

"* * * It can hardly be said to be the recognized common law of this State that the proprietary rights of the king have been abandoned to, and are now owned by, the owners of the upland in view of the fact that the right of the State to make grants of lands under water has been exercised throughout its history and has

doned the *prima facie* rule and the *jus privatum* of the king, the foreshore would have been re-established as an appurtenance of the upland title with the result that upland proprietors generally would have not merely an easement in but title itself to the beach in front of their property and the state would have no property rights therein, having succeeded to none. While the language of Gray, J., in the *Brookhaven* case[48] undoubtedly warrants this view, the decision itself grants an easement only, and subsequent cases of the court uphold the state's title to the foreshore as against the riparian owner.[49]

From the history of the foreshore, thus briefly reviewed, it may be summarized: (a) that until the reign of Charles I, under the common law, the adjacent owner held title to the beach as an appurtenance of the upland; (b) that the attempt to overthrow this doctrine culminating in the *Philpot* case and the conclusions of Lord Hale, resulted ultimately in the adoption of the rule that the king or state owned the tideway unless *specifically* granted; (c) that recently the ancient rule of title has been partially reinstated by the establishment of a broad easement of use in the foreshore in favor of the upland owner.

What are the Public Rights in the Seashore? Can the State Extinguish Them?

It having been established that the upland owner has substantial property rights in the foreshore, irrespective of who holds the title, we now approach the question of what are the public rights in the seashore. While the authorities are clear that access to and use of the beach by the riparian owner cannot be unreasonably obstructed by any other use thereof,[50] is the public entitled to pass along, bathe, picnic, anchor boats, dig shell fish, and generally use the beach, assuming such does not constitute an unreasonable interference? In order to obtain the proper perspective on this question it has been desirable, indeed necessary, to review the history of the foreshore, for if there are

never been questioned. These grants convey, not the right of dominion for purposes of navigation, but the title, the proprietary rights of the king,*** they are impliedly made subject to the superior right which was always held in trust for the public, the right of dominion in aid of navigation. ***

"It is plainly deducible from the *Barnes* case that the riparian owner and the owner of the title must exercise their respective rights in a reasonable way consistent with the rights of each other. Both are subject to the supreme right of the State and the national government to exercise dominion for the purpose of navigation."

[48] *Supra*, n. 43, at pp. 79–80.

[49] Hinkley v. State of New York, 234 N. Y. 409 (1922), holding the state owned the tideway as against the upland proprietor and despite a seventy-five year user.

[50] Sage v. Mayor, 154 N. Y. 61 (1897), holds that the riparian owner's rights are subject to the right of the state to improve the foreshore *in aid of navigation.*

public rights of property in the foreshore they have their roots in the past.

The claim is made, and there is high judicial opinion supporting it, that the public have property rights in a tidal beach.[51] What is the essential nature of this claim? Apparently it is not based upon the element of a fee title, for members of the unorganized public apparently have no greater rights in the foreshore, which is owned by the state (except by license or permission) than they would have if the title was in an individual or a town. The law of the state authorizes the institution of actions for damages against members of the public, though citizens of the state, for trespassing upon any of the public lands including lands under water.[52] If, therefore, the unorganized public is entitled to the use of the foreshore, state owned or otherwise, it must be because of some peaceable and uninterrupted usage existing from time immemorial, constituting, in effect, an unwritten covenant running with the land to which the title, no matter how held, is subservient. Such a right would be similar to, if not a true, easement; a rule of property peculiar to the foreshore in favor of the people at large. Excepting specific instances of purely local custom or prescription, such a tradition of public use applying to the foreshore *generally* is scarcely to be discovered in either the economic or legal history of New York tideways, and if, therefore, they are to be subjected to a public easement, the latter must depend for its authority upon the law of England at the time of the American Revolution from whence we inherited it, or, if not the law of England, the law as it obtained in the colonial province of New York.[53] What, then,

[51]Barnes v. Midland T. R. R. Co., 193 N. Y. 378 (1908); Bardes v. Herman 62 Misc. (N. Y.) 428 (1909); Aquino v. Riegelman, 104 Misc. (N. Y.) 228 (1918) Tiffany v. Town of Oyster Bay, 234 N. Y. 15 (1922).

[52]Public Lands Law, sec. 17.

[53]Such would seem to be the more valid test. Under the colonial grants it was stipulated that the laws of the colony of New York should follow "as near as conveniently may be" the laws of England. (Fowler's Real Property Law [3d ed.], p. 67). The New York constitution of April 20, 1777, section 35, adopted the statutes and common law of the *former colony of New York* as they existed April 19, 1775. The courts of this state are not necessarily bound by the common law of England if the latter was not in harmony with that of the colony or is not adaptable to our conditions. (Brookhaven v. Smith, *supra*, n. 43, p. 78.) While the decisions of the colonial courts of New York are unreported and there are no early New York State cases containing any discussion of public rights in the beach itself, extrinsic evidence indicates that the claim of a public easement in the seashore is of distinctly modern origin. In Bell v. Gough (*supra*, n. 29) the court pointed out that in the adjacent colony of New Jersey the foreshore was considered as belonging to the upland owner. The Massachusetts colonial "Body of Liberties", the first code of laws established in New England (1641), Article 16, provided that every inhabitant who was a householder should have the right of "free fishing and fowling so farre as the sea ebbs and flowes within the precints of the town where they dwell" unless these rights had been otherwise appropriated by the town, and further provided "that this shall not be extended

in 1775, was the common law with reference to a general public easement in and to the foreshore?

As heretofore stated, at the time of the Revolution, the theory that the king, *prima facie*, owned the foreshore had not been established in England, the law at that time being the immemorial rule that the upland owner held the title; as for public rights there are no cases adjudicating or even discussing them. The long series of litigations concerning the seashore, starting with Digges in the time of Elizabeth and continuing through the reign of the Stuart kings, do not involve public claims. They were cases of the king asserting a personal claim of ownership against the private rights of the upland proprietor. The earliest authentic expression which might be construed as referring to public rights in the foreshore is that contained in Lord Hale's treatise.[54] A careful reading of Hale discloses that he strictly limits the definition of *jus publicum* to a right of passage over water and, in a qualified sense, to a public right to fish in the waters. He states that the foreshore cannot be so used as to obstruct or interfere with this right of *navigation* and that in this respect the *jus publicum* is paramount to the *jus privatum*. The claim, therefore, that the public have rights to use the foreshore itself when the tide is out would seem to rest upon the theory that such rights are, by implication, a part of the *jus publicum* so as to include passage along the beach for bathing, boating, etc.

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to give leave to any man to come upon another's propertie without there leave." In 1647 this same colony adopted a statute giving the title to the land between high and low water mark to the upland owner. Such action negatives the suggestion of a public easement in the beach as a rule of law and was in harmony with the individualistic spirit of colonial times. Economic conditions then prevailing made it quite natural that the beach should be exclusively enjoyed by its owners. The grants were made at a time when the land was unsettled and the chief anxiety of administrators was to procure settlers and inducements were made to encourage them to develop the property granted. In those days the chief means of communication was by water and the beach fronting a person's property was of prime importance to him. Furthermore the seat of government was far distant, there was no public in the modern sense of a social entity and it was natural that the pioneeer settlers should assert an exclusive control over their property. This view is further substantiated when we recall that the dominant philosophy of the 18th century, permeating legal as well as political institutions, jealously regarded and aggressively supported individual rights in property as natural and even "sacred". (Articles 2 and 17, Declaration of Rights of Man, 1789.) "The public good is nothing more essentially interested than in the protection of every individual's private rights." (Blackstone, 1 Comm. 139.) "The doctrine of private property as a natural right has found its way, directly or indirectly, into almost every bill of rights and state constitution of the nation, thanks to the prevalent political philosophy of a century or more ago." (Mecklin, Introduction to Social Ethics, 1921, p. 302–321.) According to Dean Pound (The Spirit of the Common Law, p. 37) an ultra individualism pervaded New England institutions due to Puritanism. Apparently the "mores" of the times did not favor a public servitude upon privately owned foreshore.

[54] *Supra*, n. 21, published 1787.

The first English cases in which questions of public rights in the foreshore arise are well after the American Revolution and in the early part of the nineteenth century. Such cases are significantly coincident with the administrative development of democratic government, the emphasis in shore front litigation shifting from the the law, subsequent English cases not purporting to modify the common law "are not only entitled to careful consideration but to great weight in determining the common law rule prior to 1775."[55] The earliest of these cases, decided in 1789,[56] apparently extends the *jus publicum* of navigation to passage along the beach but appears to have been subsequently overruled,[57] while a comparatively recent case holds that "when the sea recedes and the foreshore becomes dry there is not * * * any general common law right in the public to pass over the foreshore."[58]

Turning to the courts of this state, while there are expressions to the effect that the public have general rights in the foreshore there does not appear to be any decision squarely holding upon a relevant state of facts that a tide-washed beach, especially where owned in absolute fee by an individual or a town, is subject to any public easement whatever, not even that of passage. On the contrary, the decisions, meager though they be, indicate that that portion of the soil between high and low water mark is governed by identical principles of real property law as govern the upland, that is to say, the title connotes an exclusive use of the beach, subject, however, to the easement of the upland owner.

There are two classes of adjudications leading to this conclusion. There are those cases where the state, under the *prima facie* rule, succeeding to the title of the king, made absolute grants of the foreshore, and it was held that the grantee thereunder was entitled to an exclusive use of the beach. These cases are not, however, necessarily authority that no public easement existed prior to the grant, as they might be construed as holding that the state, as the people's agent, by giving the grant, extinguished the easement. The context of the opinions fairly indicates, however, that the only public easement which exists is that of passage over the navigable waters. There is the more pertinent situation where the title passed by the colonial grants and is now owned by the towns or individuals; in such situations a public

[55]Waters v. Gerard, 189 N. Y. at p. 302 (1907).
[56]Ball v. Herbert, 3 D. & E. (Eng.) 253 (1789).
[57]Blundell v. Catterall, 5 Barn. & Ald. (Eng.) 268 (1821).
[58]Brinckman v. Matley, 12 Ch. Div. 313, 316 (1904); also Fitzhardinge (Lord) v. Purcell, 99 L.T. Rep. 154 (1908), 2 Ch. Div. 139; Blandudno Urban District Council v. Woods, 81 L.T. Rep. 170 (1899), 2 Ch. Div. 705; the latter case holding that the public could not hold meetings on the beach, even though of a religious nature.

easement if it previously existed at common law against the king's private title, would still exist, for the state never having held the title and having made no grants has released nothing.[59] The opinions in these latter cases constitute, therefore, more decisive authority as to whether as a rule of property the foreshore is burdened with a public use.

First as to the cases where there have been state grants. The contention that the state cannot alienate its title to the seashore so as to exclude the public therefrom is based upon the theory that the state holds the foreshore not as a proprietary owner, but in a political capacity in trust for the people and as trustee cannot divest itself of the title.[60] This theory in turn goes back to the idea that while the king could convey his private title to the lands under water (the *jus privatum*), that he could not convey or cancel by conveyance the public right over the navigable waters (the *jus publicum*) which, as sovereign, he held in trust.[61] The whole contention is, undoubtedly, based upon Lord Hale's treatise defining in conjunction the *jus publicum* and the *jus privatum* and borrows color from the close association of the foreshore and the navigable waters in English history, both having been subject to the attack of the Stuart kings.

If, however, we sharply differentiate rights in the shore when the tide is out from rights of navigation,[62] the weight of authority in this state holds that an unqualified grant from the state extinguishes any public rights, for the legislature, representing the people, has authorized such grants and has provided the machinery through the commissioners of the Land office whereby they can be made, absolute in terms and for beneficial enjoyment.[63] Moreover, the statute

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[59]Although it might be contended that the ratification of crown grants by the New York colonial assembly in 1694, *supra*, n. 34, extinguished any public easement.

[60]Coxe v. State, 144 N. Y. 396, 405–406 (1895).

[61]People v. N. Y. & S. I. Ferry Co., 68 N. Y. 71, 76–77 (1877).

[62]As to the power of the state to extinguish the *jus publicum* of navigation by granting the navigable waters themselves, *quaere*. The early cases apparently uphold such grants. Wetmore v. Atlantic Lead Co., 37 Barb. (N. Y., 17 (1862); People v. N. Y. & S. I. Ferry Co., *supra*; Langdon v. Mayor, 93 N. Y. 129, 155–156 (1883); Kerr v. West Shore R. R. Co., 127 N. Y. 269 (1891). Also see Riggs, The Alienability of the State's Title to the Foreshore, 12 Col. L. Rev. 409. Later cases, however, indicate a contrary and probably sounder view. Cox. v. State, 144 N. Y. 396 (1895); Sage v. Mayor, 154 N. Y. 61 (1897); Matter of Long Sault Development Co., 212 N. Y. 1 (1912); Appleby v. City of N. Y., 235 N. Y. 351 (1923); People ex rel. N. Y. C. R. R. Co. v. State Tax Commission, Ct. Appeals, Dec. 9, 1924. As to whether the *jus publicum* or control over navigation is in the state or federal government, see Gibson v. United States, 166 U. S. 269, 271 (1897); People v. Hudson River Connecting R. R., 228 N. Y. 203, 218–220 (1920).

[63]Public Lands Law, sec. 75. Prior to 1850 the law authorized grants by the state in aid of commerce; since 1850 the law in addition authorizes grants to adjacent upland owners "for beneficial enjoyment".

provides that such grants can only be made to the "proprietor of the adjacent land" which apparently is another recognition of his ancient status as owner of the beach in front of his property. In making such a grant the state, of course, may expressly reserve a public right of passage or make a conditional grant in the nature of a franchise for the purpose of improving the water front, which may be cancelled if the grantee fails to comply with the conditions.[64] Otherwise it is difficult to see why the state's power to alienate the foreshore should be regarded differently than with reference to the other public lands as to which the people's representatives have authorized conveyances, and which are not prohibited by any constitutional provision.

Rogers v. Jones[65] is one of the earliest cases holding that public rights can be extinguished by a grant. Here the lands under water were owned by the town of Oyster Bay by virtue of a colonial crown grant. Rogers, apparently an inhabitant of the town, took oysters from the town's land and was sued for a penalty imposed for such a taking. Rogers defended on the ground that the *jus publicum* accorded a public right of fishery which the town could not interfere with. The court held that the grant by the king to the town, expressly including the fishery rights, cut off any public right thereto. This case is particularly significant, for while it does not involve rights in the foreshore itself, it goes further and holds that the right of fishery in navigable waters, which Hale specifically mentions as being part of the *jus publicum*, could be extinguished by a grant from the king.

In *Nolan v. Rockaway Park Improvement Co.*,[66] the court excluded the public from the use of the beach on the ground that the grant from the state had cut off whatever public rights may have existed. The leading modern case is that of *People v. Steeplechase Park Co.*[67] The state grant was to an individual, for beneficial enjoyment, of part of the seashore along Coney Island, a beach greatly frequented by the public for recreational purposes. Prior to the conveyance, the public had passed over this portion of the beach and the new owner, by erecting piers, prevented such passage. The court held where the state has conveyed land without restriction intending to grant a fee therein for beneficial enjoyment, the title of the grantee except as

[64]Williams v. Mayor, 105 N. Y. 419 (1887); Trustees of Southampton v. Jessup, 162 N. Y. 122 (1900); American Ice Co. v. City of N. Y., 217 N. Y. 402 (1916); First Construction Co. v. State of N. Y., 221 N. Y. 295 (1917).

[65]1 Wend (N. Y.) 237 (1828). To same effect, Brookhaven v. Strong, *supra*, n. 34; Robins v. Ackerly, 91 N. Y. 98 (1883); Hand v. Newton, 92 N. Y. 88 (1893).

[66]76 Hun. (N. Y.) 458 (1895).

[67]218 N. Y. 459 (1916).

against the riparian owner is absolute, and the public may be excluded. This decision was dissented from by three of the judges on the ground that there should be read into the grant an implied reservation of public rights.[68]

In a recent case (1923)[69] the court again discusses the effect of a grant on the extinguishment of public rights. The opinion states in part:

> "* * *to what extent has the state by its grants extinguished the *jus publicum* over such lands. * * * so long as they remained under water they were subject to the sovereign power of the state to regulate their use for *purposes of navigation.* * * * But no case holds that any substantial interference with navigation may thus be authorized. * * * The lands in question remained under the public waters of the State and so long as they remained such, the *right to control navigation over them* remained in the State to be exercised in the public interest."[70]

This view seems to indicate that the court does not consider there is a public easement of access to and of use in the beach itself, for the only public right it exempts from the operation of the grant by the state, is that of passage over the navigable waters.

Turning to cases where there is no question involved of the state having by grant extinguished public rights, in the case of *Murphy v. City of Brooklyn*,[70a] decided in 1885, the plaintiff, in a tort action, claimed that the city had been negligent for causing and permitting a hole to remain on the upland immediately adjacent to the beach *owned by the city* on the theory that the beach was a public highway. The court stated: "But the seashore is not a highway for public travel on foot or with vehicles. It is a part of the ocean and that is a highway for vessels. Everyone can, however, unless the public authorities by lawful action interfere, go upon the seashore between high and low water mark to fish, to bathe or for any other lawful purpose." While the court stated that the public could use a tideway which was owned *by the municipality*, nevertheless such a usage was

[68]A crown grant contained an implied reservation of public rights of *navigation*. People v. N. Y. & S. I. Ferry Co. (1877), *supra*, n. 61, at p. 76. In the Steeplechase case the claim was of access *over the beach* at low tide. In Aquino v. Riegelman (1918), *supra*, n. 51, the court at trial term refused at the risk of being deemed "recalcitrant" to follow the authority of the Steeplechase case, and required an express habendum clause in the state grant of the beach to extinguish public rights; but here also the claim at bar was not one of navigation but of access to the beach itself.

[69]Appleby v. City of New York, *supra*, n. 62. To same effect, Matter of Public Service Commission (Montague Street), 224 N. Y. 211 (1918); Matter of Long Sault Devel. Co., *supra*, n. 62; People ex rel. N. Y. O. & W. R. R. Co. v. State Tax Comm., 191 N. Y. S. 464 (1921).

[70]At pp. 360, 362; italics are writer's.

[70a]98 N. Y. 643.

by way of permission which could be stopped byg overnmental agents, and there were no property rights such as an easement of passage or otherwise in favor of the public even though the shore was publically owned.

In the *Matter of the City of New York (Main Street)*,[71] decided in 1915, the court held that where a public street or highway met with navigable waters at high tide *that this fact* gave an extended easement of public passage across the foreshore in order to reach the water when the tide was out even through the title to that portion of the foreshore was held by an individual derived from a crown patent. But the court stated:

> "The title of the appellant vested in her the right * * * to use the parcel of land under waters for any and all purposes which did not bar the public from reaching the waters of the sound from the terminus of Main street or the street from the waters of the sound, and the further right to so use them *free from such restriction whenever, if ever, the street should be abandoned or discontinued.* The right was private property protected by the relevant constitutional provisions."[72]

The idea clearly expressed in the foregoing quotation that shore lands owned by an individual under a crown patent are private property not subject to any general public easement (the case at bar involved a specific and purely local situation where an upland public highway connected with navigable waters) is echoed in the early case of *Wetmore v. Atlantic Lead Co.*,[73] where the court stated in part as follows, referring to the filling in of shore land by the upland owner under a state grant:

> "When reclaimed and covered with artificial structures, they became a part of the bank of the river, and were no longer subject *to the public easement which affected the channel.* As far as such artificial accretions are made to public highways upon the bank or shore, they become a part of such highways, but when added to a portion of the bank *over which no such right of passage existed,* they are a gain to the adjoining proprietor, *and do not bring with them a right of use or passage over the land, in consequence of the right of navigation which had existed over the waters* which had been displaced by such additions to the land."[74]

In *Smith v. Odell*,[75] decided in 1922, the town of Brookhaven held title to lands under water in Great South Bay. The town leased to the defendant, a private individual, certain of this land for hunting

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[71]216 N. Y. 67 (1915).
[72]At p. 77; italics are writer's.
[73]37 Barb. 70 (1862).
[74]At p. 97; italics are writer's.
[75]234 N. Y. 267 (1915).

purposes. The residents of the town were thus hindered in their enjoyment of duck-hunting on the bay and marsh lands and brought an action to cancel the lease. The court held that as the town owned the waters and the lands thereunder it was entirely within its rights to lease the same to an individual to the exclusion of its inhabitants and the general public so long as such leasing did not interfere with the public right of navigation over the waters. The court stated:

> "The trustees and their predecessors [are] invested with the fee of the lands * * *.
>
> "The title of the trustees and the rights conferred by the patents are subject, however, in the interest of commerce, to the right of the public to use the waters of the bay for the purpose of navigation.
>
> "The public right, whatever it might otherwise be, must be held limited in such a situation to the right to use the waters for the purposes of a public highway. * * * *the easement of passage over navigable waters does not involve the surrender of other privileges which are capable of enjoyment without interference to the navigator.*"[76]

While this case does not specifically involve the foreshore the inference is clear that the town could, with equal propriety, have leased its shore lands to a private interest to the exclusion of its residents, as the only general public easement protected by the law is that of navigation over the waters, which easement does not include other uses.

In harmony with this decision, are several other adjudications with reference to the beach titles of Long Island towns acquired under the colonial grants; these cases consistently hold that the town's title is a private or proprietary one and that such shorelands are not subject to any public rights, the town having power to sell or lease exclusive privileges therein.[77] In the *Town of Islip v. Estates of Havemeyer Point*[77a] involving a piece of beach land, the court stated:

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[76]At pp. 271, 272; italics are writer's.

[77]Roe v. Strong, 107 N. Y. 350 (1887); Town of Southampton v. Mecox Bay Oyster Co., 116 N. Y. (1889); Brookhaven v. Smith *supra*, n. 34; Town of Islip v. Estates of Havemeyer, 224 N. Y. 449 (1918). Apparently the trustees of towns owning title to beaches on Long Island, may, subject to the control of the inhabitants expressed at town meetings, make such rules and regulations concerning the use of their beaches as they deem proper, excluding the general public entirely, charging admission fees, selling, leasing, or otherwise alienating the beach as in the case of an individual owner. The towns' rights in their beaches are subject only to the rights of the riparian owner and the public right of navigation over the waters. Apparently, however, in the case of the City of New York, which acquired title to the lands to low water mark along the Hudson and East Rivers by the colonial patents of Governor Dongon, in 1686, and Montgomerie, in 1730, such foreshore is impressed with a public trust as the terms of the grant reserved the right to control and regulate its use in the crown and the colonial government. 182 N. Y. 361, 368 (1905); Parsons, *supra*, n. 28, at p. 722–23. In the Tiffany case (*supra*, n. 51, p. 21) Pound, J., referred to the case of Matter

"These lands were held by the town in private as distinguished from public ownership. It needed no legislative authority to enable it to deal with them as its interests might require. It could devote them to the use of the inhabitants in common. It could convey or lease them."

The case of *Barnes v. Midland Railroad Terminal Company*,[78] decided in 1908, is often cited as authority for the doctrine that the people have the right of passage, bathing, etc., in the foreshore, and the opinion specifically so states. The facts in this case show that the plaintiff was seeking to restrain the upland owner from obstructing, by the erection of a pier, the passage of the public along the beach. Title to the foreshore in this case had been *in the State of New York* from whom the defendant company had received a *conditional* grant permitting it to erect a pier over the beach providing, however, that it should not "in any manner, obstruct, interfere with, inconvenience or prevent any person or persons from or in crossing and re-crossing in any manner or way said land between high and low water mark * * *." Therefore, while the opinion contains expressions to the effect that there are public rights of fishing, bathing, and boating in the foreshore what the court actually decided in this case was that, while the plaintiff had a right to erect a pier, he could not erect it so as to obstruct the public passage, *that right being reserved in the grant from the state.*

The recent case of *Tiffany v. Town of Oyster Bay*[79] decided that the town, although it owned the foreshore which had been filled in by the plaintiff, could not use such filled in foreshore for the erection of bathhouses, as such use would interfere with Tiffany's right of access to the water as a riparian owner. In the opinion, however, there are expressions of a general nature which while not necessary to the decision in the case, indicate a public easement in the foreshore generally. Pound, J., says:

"Land under the waters of the sea and its arms, between high and low-water mark, is subject, *first*, to the *jus publicum*—the right of navigation, and when the tide is out, the right of access to the water for fishing, bathing and other lawful purposes to which the right of passage over the beach may be a necessary incident. (*Barnes v. Midland R. R. T. Co., 193 New York 378,*

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of Mayor, etc., as holding that a municipal ownership of the foreshore is "for the use of the public as well as for commerce", whatever that may imply. It is fairly obvious, however, that what the court was discussing in the latter case was the development of commerce in conjunction with public rights of navigation and the waterfront, which view is substantiated by the opinion in Matter of Mayor Bedlow v. N. Y. FloatingDry Dock Co., 112 N. Y. 263, 273 (1889).

[77a]224 N. Y. 449, 452 (1918).

[78]193 N. Y. 378 (1908).

[79]234 N. Y. 15, 20 (1922).

384). Such land is also subject, *secondly*, to the *jus privatum*, the rights of the owner of the foreshore * * *. Such rights are at all times subject to the public rights* * *."

While it is not entirely clear from the context what the court meant by *jus publicum* it apparently included therein both the right of navigation and a public right of passage over the beach with incidents of fishing, boating, etc., making such rights paramount to the rights of the owner. Such a definition of the *jus publicum* is neither historically correct, nor is it supported, except by dicta, by the actual decision in the *Barnes* case cited, preserving a public right of passage reserved in the state grant. These expressions of opinion in the *Barnes* and *Tiffany* cases[80] are contrary to the opinions of the same court in *Matter of City of New York* (*Main St.*),[81] in *Smith v. Odell* and similar cases[82], wherein the court held that lands under water, title to which was based on a grant from the crown, were subject only to the public right of navigation. They are also essentially contrary to the *Rockaway Beach Improvement Co.*[83] and *Steeplechase*[84] cases which while holding that grants from the state extinguished any public right in the beach, indicate in the opinions that there existed no property rights in the shore itself equivalent to a public easement.

The English cases sustain the view that the *jus publicum* over navigable waters does not include public rights in the shore itself. In *Brinckman v. Matley*[85] the court held:

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[80]The court in the Barnes case (Werner, J., writing) cited no authority in support of its opinion that there are public rights in the foreshore, while in the Tiffany case the court cites only the Barnes case in support of its definition of the *jus publicum*. Furthermore, in the Tiffany case it is also stated that if the foreshore is filled in it extinguishes the *jus publicum*. This would indicate that the *jus publicum* consists only of the right of navigation, which naturally is prevented by the fill excluding the water over the filled-in land at high tide. If, however, the *jus publicum* also includes rights of passage over the land for fishing, bathing, etc., a mere filling in would not make such rights physically unavailable so as to extinguish them. In Bardes v. Herman, *supra*, n. 51, at p. 432, the court states as part of the *jus publicum*, citing the Barnes case only:—"The public, therefore, had the right to use the foreshore for fishing, bathing, boating and navigation." But the decision merely involved the question as to whether a vendor offered a good title to low water mark under a state grant, the court holding that the title was good, the grant having extinguished any public rights. There is also disagreement in the textbooks. Hall, The Rights of the Crown and the Privileges of the Subject in the Seashores of the Realm (Published 1830), at pp. 179–180, states that the public have an easement of passage, bathing, boating, clamming, etc., while Farnum on Waters, at p. 656, states that there are no public rights in the shore, that it is not a highway, whether privately or publicly owned.

[81]*Supra*, n. 71.

[82]*Supra*, n. 73, 75, 77, 77a.

[83]*Supra*, n. 66.

[84]*Supra*, n. 67.

[85]*Supra*, n. 58 at p. 315.

"By the common law all the King's subjects have in general a right of passage over the sea with vessels for the purposes of navigation and have, *prima facie*, a common of fishery there, and they have the same rights over that portion of the sea which lies over the foreshore at the times when the foreshore is covered with water. But when the sea recedes and the foreshore becomes dry there is not, as I understand the law, any general common law right in the public to pass over the foreshore."

The leading English case of *Blundell v. Catterall*,[86] decided in 1821, involved the issue as to whether the public had a common law right to bathe on a private beach. The owner objected to the practice and sought an injunction. The *minority* opinion of Best, J., states in part:[86a]

"The question in this case is, whether there be a common-law right to pass over the shore for the purpose of bathing in the sea. * * * There must be the same right to cross the shore in order to bathe as for any other lawful purpose. We are, therefore, to decide whether the public are precluded from passing * * * over the beach to the sea without the consent of some lord of a manor. * * * The king had the right of soil in the shore in general; but the public had a right of way over it, and the king's grantee can only have it, subject to the same right. In the treatise of *De Jure Maris*, p. 22, Lord *Hale* says, 'the *jus privatum* that is acquired to the subject * * * must not prejudice the *jus publicum* wherewith public rivers and arms of the sea are affected for public use.' * * *

"The reason on which my judgment is grounded is public advantage. The right of bathing in the sea, which is essential to the health of so many persons, is as beneficial to the public as that of fishing and must have been as well secured to the subjects of this country by the common law.* * *

"* * *From the general nature of this property it could never be used for exclusive occupancy. It was holden by the king, like the sea and the highways, for all his subjects. The soil could only be transferred, subject to this public trust; and general usage shows that the public right has been excepted out of the grant of the soil. * * * But unless I felt myself bound by an authority as straight and clear as an act of Parliament, I would hold on principles of public policy, I might say public necessity, that the interruption of free access to the sea is a public nuisance. * * * In all countries it has been a matter of just complaint, that individuals have encroached on the rights of the people. In *England* our ancestors put the public rights in rivers under the safeguard of magna charta. The principle of exclusive appropriation must not be carried beyond things capable of improvement by the industry of man. If it be extended so far as to touch the right of walking over these barren sands, it will

[86] *Supra*, n. 57.
[86a] At pp. 274, 276, 284, 287–8.

take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbors. * * * For these reasons, I am of the opinion that the defendant is entitled to the judgment of the Court."

This view, eloquently spoken as it is, did not prevail but was countered by the three opinions of equal conviction and even closer reasoning. These utterances well illustrate contrasting schools of juristic philosophy. The prevailing opinion of Holyrod, J., which follows, said to be the finest he ever wrote, "a model of judicial utterance",[87] is, in part, as follows:—

"* * *By the common law, all the king's subjects have in general a right of passage over the sea with their ships, boats, and other vessels, for the purposes of navigation, commerce, trade, and intercourse, and also in navigable rivers; and they have also, *prima facie*, a common of fishery there. * * * These rights are noticed by Lord *Hale*; but whatever further rights, if any, they may have in the sea, or in navigable rivers, is a very different question whether they have * * * independently of necessity or usage, public rights upon the shore * * * when it is not sea, or covered with water, and especially when it has from time immemorial been, or has since become, private property. * * * Neither in Lord *Hale's* treatise nor elsewhere, does it appear that there is a common law right in the king's subjects in general, or any of them, to appropriate the sea-shore, or the soil even below the low water-mark, for general purposes, though temporary only, to their own use, without the king's grant or licence, even where that can be done without nuisance to his subjects.* * *

"But, further, such a general public right in all the king's subjects, to use the sea shore for all such temporary purposes as they please, would be, I think, inconsistent with the nature of permanent private property, or with the sea shore becoming such permanent private property. * * *

"* * *The public common law rights, too, with respect to the sea, etc., independently of usage, are rights upon the water, not upon the land, of passage and fishing on the sea, and on the sea shore, when covered with water; and though, as incident thereto, the public must have the means of getting to and upon the water for these purposes, yet it will appear that it is by and from such places only as necessity or usage have appropriated to those purposes, and not a general right of lading, unlading, landing, or embarking where they please upon the sea shore, or the land adjoining thereto, except in case of peril or necessity."[87a]

In a concurring opinion upholding the right of plaintiff to enjoin the trespass, Abbott, C. J., remarks,[87b]

[87]L. T. Rev. London, vol. 139, p. 381; also, Fitzhardinge v. Purcell, *supra*, n. 58.
[87a]At pp. 294, 298–9, 301–2.
[87b]At p. 313.

"One of the topics urged at the bar in favor of this supposed right was that of public convenience. Public convenience, however, is in all cases, to be viewed with a due regard to private property, the protection whereof is one of the distinguishing characteristics of the law of *England*."

In the recent case of *Stewart v. Turney*,[88] the court held that the plaintiff under an unconditional grant from the state could keep the public from trespassing on his beach. The grant here was of property on Cayuga lake, a large and navigable body of water, and the proof showed that the beach was thirty feet wide in the dry season, but at high water was covered so that small boats could navigate thereover. The only question was as to title, and the court held that it went to low water mark and that the trespass should be restrained. The court did not even mention any public rights in the beach, nor did it question the authority of the commissioners of the Land office to make the unconditional grant in this case, while in the *Steeplechase* case, three of the four judges denied the effectiveness of a state grant to cut off what they apparently considered to be a public easement of access to a beach at Coney Island. The waters in both cases were navigable in fact and therefore subject to the public right of navigation; the only difference being that the beach at Cayuga lake is caused by the rise and fall of non-tidal water while the beach at Coney Island is made by the salt tides. This distinction, however, as determinative of the public right of navigation probably never obtained in England, and certainly not in American jurisprudence.[89] There would seem, therefore, to be no logical reason if a public easement in the beach is to be upheld, by implication, as part of the *jus publicum* of navigation, why it should not apply to a fresh as well as to a salt water beach.

The idea that the *jus publicum* includes rights in the beach when the tide is out doubtless arose from the close association in English economic and political history of the foreshore and the navigable waters, reflected in the *jus privatum* and *jus publicum* of Lord Hale's jurisprudence. Prior to Hale's writings the *jus privatum* of the foreshore was unheard of, as the upland owner held the title to the beach, but when the theory was advanced that the king in his private capacity owned the shore and lands under water, it became necessary to distinguish by phrase between such a private title and the public title which as sovereign he already held to the sea and navigable rivers.[90] Indeed, it is significant to note that the efforts of Charles I

[88]237 N. Y. 117 (1923).

[89]Stegmeier v. State, 191 N. Y. S. 894, 897 (1922), aff'd. 204 App. Div. 858; Colson, Title to Beds of Lakes in New York, 9 CORNELL LAW QUARTERLY, note at p. 309.

to obtain the foreshore were on behalf of himself and not the people, and that the protest in the Grand Remonstrance against such aggressions was not by the people on behalf of a public use in the beaches but by their owners, the adjacent upland proprietors. As it happened the king did not merely interfere with private rights in attempting to usurp the beaches but also with public rights with reference to the navigable waters and of fishery therein.

The resultant confusion that has arisen with reference to public rights in the foreshore has doubtless been largely due to the failure to distinguish clearly between the public right of navigation over the waters and a private ownership of the tideway, which, periodically, is under those waters. From the fact that "the sea and navigable rivers are a natural highway"[91] it does not follow that there are analagous rights in the land when the water has receded. "It is a general principle of law governing every such servitude, (a right of way) whether of private or public interest, that nothing appears as incident to an easement but that which is requisite to the fair enjoyment of the right."[92] Certainly in order to navigate, it is not necessary to use the beach except at established landing places. At low tide the waters are further removed from the land, at high tide they come nearer, but the highway over them remains the same; it shifts but does not change its character, nor is the right of the people to pass in boats interfered with; the use of the dry beach is hardly "requisite to its fair enjoyment".

Probably if it had not been for the adoption of the theory of a royal private ownership of the *seashore*, evolving, as a result of the American Revolution, into a state or public ownership, there would have been no ostensible basis upon which to advance a claim of public usage in and to what essentially had always been private property. This is clearly indicated in the case of a fresh water or non-tidal beach, title to which goes with the upland, and although the waters over such a beach, if naviagble, are subject to the public right of navigation or *jus publicum*, there are no public rights to the use of the beach itself.[92a] To the attempt, therefore, of a tyrannous king to despoil individual Englishmen of their tidewater beaches, we can trace the genesis of the claim to a public easement, while

[90]Hiscock, J., in his dissenting opinion in the Brookhaven case (*supra*, n. 43 at p. 90–91), clearly sets forth this distinction, even to the different legal remedies showing that as to a structure on the beach which did not interfere with navigation, the king could have it removed as a purpresture upon his private land, whereas if it interfere with navigation it could be abated as a public nuisance.

[91]People v. N. Y. & S. I. Ferry Co., *supra*, n. 61.

[92]Comm. of Canal Fund v. Kempshall, 26 Wend. (N. Y.) 404, 414 (1841).

[92a]Ledyard v. Ten Eyck, 36 Barb. (N. Y.) 102, 107 (1862).

theories born of this exercise of the divine right of kings wherewith to curtail individual enjoyment have become, by involution, and under the exigencies of an industrialized democracy, arguments, *pro bono publico*. If, as has been asserted, but apparently not as yet decided in this state, the *jus publicum* is not merely the right of navigation but includes access to and passage along the shore, with or without the incidents of bathing, etc., there would in time cease to exist anything resembling a private beach, except in the barren sense of the naked title thereto.

The Police Power and the Seashore

Echoing the minority utterance of Best, J., in the *Blundell* case[93] to the effect that public convenience and necessity demand that the beach, even though privately owned, be impressed with a servitude in favor of the people, is the expression of opinion in a recent article in which the suggestion is made that the *jus publicum* is really the police power of the state to be exercised over the beach for the public benefit.[94] Such a view abandons the effort to sustain historically the *jus publicum* as a right of property; it ignores precedent and considerations of title and proceeds on a distinctly pragmatic basis. In entertaining such a view we must assume legislative action on the theory that the beach is imperatively identified with the public health, safety, morals, or welfare, and if in addition the seashore can be classed as monopolistic because of the limitation of supply[95] in conjunction with the demands of population, the police power theory is at least tenable. Thus considered the issue becomes one between a private exclusive enjoyment based upon an authenticated title and the claim that the public at large should participate in such enjoyment because of the social requirements of the situation. Such an issue directly reflects the ever-growing conflict between an individual philosophy, the ultimate basis of private land ownership, and its ardent opponent, the school of sociological jurisprudence. As Mr. Cardozo expresses it, "Men are saying today that property, like every other social institution, has a social function to fulfill."[96] In this respect, the idea of public convenience specifically rejected in favor of an exclusive private use by Abbott, Ch. J., in the *Blundell* case over one hundred years ago, finds its reverse counterpart in the prevailing opinion of the Court of Appeals in a recent ease. Thus do

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[93]*Supra*, n. 57.
[94]Parsons, Public and Private Rights in the Seashore, *supra*, n. 53, at p. 719.
[95]Wyman, Special Laws of Public Service Corporations: Limitation of sites as affecting question of monopoly, ch. iii, secs. 90-96.
[96]Cardozo, Nature of the Judicial Process, p. 87.

the dissenting opinions of yesterday become the law of to-morrow.

Pound, J., speaking for this court, upholding an act of the legislature regulating the rentals of private property in New York City,[97] says:—

> "* * *The Legislative or police power is a dynamic agency, vague and indefinite in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process. Either the rights of property and contract must, when necessary, yield to the public convenience, advantage and welfare, or it must be found that the State has surrendered one of the attributes of sovereignty for which governments are founded, and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare. * * * The question comes back to what the State may do for the benefit of the community at large. * * * The struggle to meet changing conditions through new legislation constantly goes on. The fundamental question is whether society is prepared for the change. The law of each age is ultimately what that age thinks should be the law. * * * While some may question whether it may be said without exaggeration that these enactments promote the public health or morals or safety they do in a measurable degree promote the convenience of many, which is the public convenience and the public welfare and advantage * * *."

Under the fair inference of such language would it be a far step for this court to uphold an act of the legislature declaring privately owned beaches in the vicinity of New York City subject to a public use on the ground that such action was for the convenience, welfare, and advantage of many people? Short, however, of such legislative action and judicial support thereof, it is concluded that the seashore under existing common law is restricted to a private use where privately owned as is the upland[97a]. If such is the law to-day it has for its basis the principle of order and system and the authority of "history and philosophy and custom"[98]—it is the static conception of property. It is still open for another age to invoke a different method primarily involving considerations of social utility and dynamic

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[97]People v. La Fetra, 230 N. Y. 429 (1921).

[97a]The discussion herein merely attempts to state the law as it is and not to rationalize with reference to a public participation in the seashore. While the conclusion reached is that the legal mechanism of an easement in privately owned seashore in favor of the public cannot be found in or deduced from the "traditional materials", it would be hazardous to infer in an age given to the "socialization of law", that the door is therefore completely closed. Judicial origination based upon the police power or some newer theory of property, as yet unformulated in our legal system, may upset the traditional status. This has been recently indicated by a recognized jurist (Pound, The Spirit of the Common Law, 1921, pp. 186, 196, 199).

[98]Cardozo, *supra*, n. 96, p. 65.

aspects of ownership. This would be invoking "the method of sociology"—a method which "bends symmetry, ignores history and sacrifices custom in the pursuit of other and larger ends."[99] Whether the different rule thus to be reached would subserve the profound and ultimate needs of society, "the final cause of law",[100] is at least open to doubt; it is, in any event, a question of unknown and relative values for philosophic inquiry and experimental appraisement. Such a question does not fall within the present survey.[101]

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[99]*Idem*, p. 66.
[100]*Idem*, p. 67.
[101]If there is a public need for the beaches, there is, of course, always the power of eminent domain; the state may condemn and so obtain upon rendering compensation.